United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

74-2079

To be argued by
ANTHONY J. D'AURIA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2079

M. SPIEGEL & SONS OIL CORP.,

Plaintiff-Appellee,

—against—

B. P. OIL CORP.,

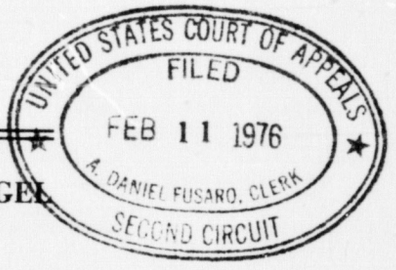
Defendant-Appellant,

—and—

STANDARD OIL COMPANY (SOHIO),

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



SUPPLEMENTAL ANSWERING BRIEF OF M. SPIEGEL & SONS OIL CORP., PLAINTIFF-APPELLEE

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February 12, 1976

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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M. SPIEGEL & SONS OIL CORP.,

Plaintiff-Appellee

-against-

B. P. OIL CORP.,

Defendant-Appellant,

-and-

STANDARD OIL COMPANY (SOHIO),

Defendant.

On Appeal from the United States District Court for the Eastern District of New York

SUPPLEMENTAL ANSWERING BRIEF OF M. SPIEGEL & SONS OIL CORP., PLAINTIFF-APPELLEE

Appellee, M. Spiegel & Sons Oil Corp. ("Spiegel") submits this supplemental answering brief in accordance with this Court's order of January 15, 1976. Appellant B.P. Oil Corp. ("BP") filed its supplemental brief on January 29, 1976.*

*"S. Br. ____" refers to pages in BP's supplemental brief.

THE CONTINUED VIABILITY OF AND SUPPLY OF GASOLINE TO INDEPENDENT MARKETERS IS REQUIRED AS PART OF THE NATIONAL ENERGY POLICY ESTABLISHED BY THE ENERGY POLICY AND CONSERVATION ACT OF 1975.

On December 22, 1975, President Ford signed into law the Energy Policy and Conservation Act of 1975, Public Law No. 94-163 ("EPCA").* That Act "establishes a comprehensive national energy policy to:

(1) maximize domestic production of energy and provide for strategic storage reserves of crude oil, residual fuel oil and refined petroleum products;

(2) to [sic] minimize the impact of disruptions in energy supplies by providing for emergency standby measures;

(3) provide for domestic crude oil prices that will encourage domestic production in a manner consistent with economic recovery; and,

(4) reduce domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs." H. R. Rep. No. 94-700, 94th Cong., 1st Sess. at 116-117 (1975).

The EPCA, in addition to the above, also makes certain amendments to the Emergency Petroleum Allocation Act of 1973 ("EPAA"). These amendments demonstrate beyond dispute that the "comprehensive national energy policy" established by the EPCA includes the preservation of the competitive viability of independent distributors such as Spiegel, and requires

*Relevant sections of the EPAA are reproduced as Exhibit "A" hereto.

continued distribution of petroleum products to them.

Section 454 of the EPCA amends the EPAA by adding a new section 11 to the 1973 Act. Section 11 authorizes the President, after following appropriate procedures, to modify or eliminate regulations promulgated under Section 4(a) of the EPAA. The regulations may be modified if the modifications are "consistent with the attainment, to the maximum extent practicable, of objectives specified in section 4(b)(1)", and regulations may only be eliminated if it is found that they are "no longer necessary to provide for the attainment of such objectives". The objectives in Section 4(b)(1) include:

> "(D) Preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers"

and

> "(F) Equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users".

Section 12 of the EPAA, added by Section 455 of the EPCA, likewise authorizes the President to amend the regulations under Section 4(a), but only:

> "if he determines that such amendment is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1) and that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives."

Therefore, any modification or elimination of regulations under the EPAA which would have the effect of denying to independent marketers such as Spiegel the right to a continued supply of gasoline would be contrary to the EPAA and EPCA and, therefore, invalid.*

Section 12 of the EPAA also provides that any amendment to the regulations under Section 4(a) which would have the effect, inter alia, of removing mandatory allocation requirements for gasoline, must be submitted to Congress in accordance with the procedures specified in Section 551 of the EPCA. Such an amendment must be supported by extensive findings by the President that there will be no adverse impact on supplies or on market prices and competition. Even if the President so finds, however, either house of Congress may disapprove the proposed amendment. There is, therefore,

*BP, in its half-page analysis of the recent comprehensive energy legislation (S. Br. 3), notes that in signing the EPCA into law, President Ford stated his intention to remove current price and allocation regulations except those on crude oil prices. BP conveniently ignores that the President stated that any changes would be "as authorized by the legislation". Weekly Compilation of Presidential Documents, Vol. 11 No. 52, at p. 1392 (December 29, 1975).

no basis for BP's speculation (S. Br. 3) that "gasoline allegation requirements as to Spiegel may soon be removed.

The FPCA also amended the EPAA with respect to administration and enforcement. Section 452 of the EPCA amends section 5 of the EPAA by adding certain penalty provisions for violations of the Act. These provisions replace those of Section 208 of the Economic Stabilization Act of 1970 ("ESA"), which had been incorporated into the EPAA by Section 5 of the 1973 Act. Section 211 of the ESA, which creates a Temporary Emergency Court of Appeals and grants that court exclusive jurisdiction to hear appeals under that Act, was expressly reincorporated into the EPAA by the new amendment.

Finally, Section 461 of the EPCA extends the EPAA for 40 months from the effective date of amendments to regulations required under the new amendments. Thereafter, the President's authority to promulgate, make effective and amend the regulation under Section 4(a) of the EPAA becomes discretionary rather than mandatory.

ORDERS GRANTING INTERLOCUTORY INJUNCTIONS UNDER THE EMERGENCY PETROLEUM ALLOCATION ACT ARE APPEALABLE ONLY TO THE TEMPORARY EMERGENCY COURT OF APPEALS, AND THEN ONLY UPON CERTIFICATION BY THE DISTRICT COURT.

As Spiegel's memorandum in support of its motion to dismiss demonstrates, Congress has determined to grant the Temporary Emergency Court of Appeals ("TECA"), created by the ESA, exclusive jurisdiction over appeals of orders, such as the preliminary injunction issued by Judge Judd, entered under the EPAA by federal district courts. Recent decisions by the TECA demonstrate that, not only did Congress determine to funnel all decisions under the EPAA to the TECA to assure consistency of decisions and efficiency in determination, but it also limited appeals of interlocutory orders issued under that Act to cases where the district court determines to certify an appeal pursuant to 28 U.S.C. §1292(b). BP, however, by an argument that can only be described as hopelessly contrived, asserts in effect that by ignoring the provisions of the EPAA, failing even to request district court certification, and attempting to appeal to the wrong court, it may unilaterally resurrect in this Court the jurisdiction that Congress removed from it and granted to the TECA. Such a result would make meaningless the carefully considered network of judicial review established by the ESA and incorporated into the EPAA, and

frustrate the principles for which that netword was established.*

In Exxon Corporation v. Federal Energy Administration, 516 F.2d 1397 (Em. App. 1975), the TECA extensively reviewed the jurisdictional grant it had received from Congress. The Court noted, 516 F.2d at 1400, that when the ESA was first passed, there were no special provisions for judicial review, and interlocutory orders granting or denying injunctions were reviewable as of right in the circuit courts under 28 U.S.C. §1292(a). Other non-final orders could be reviewed upon certification in accordance with 28 U.S.C. §1292(b). Section 211 of the ESA, establishing the TECA, granting it exclusive jurisdiction of appeals and regulating judicial review under that Act, was added by the ESA Amendments of 1971 (Pub. L. No. 92-210).** That section limits review of interlocutory orders by the TECA to those certified by the district court. An amendment which would have permitted review of interlocutory injunctions by the TECA in the previous manner was defeated, with the comment

*Those principles were summarized by the Senate Committee on Banking Housing and Urban Affairs as "(1) speed and consistency of decisions in cases arising under the Act, (2) avoidance of any breaks or stays in the operation of the Stabilization Program, and (3) relief for particular persons aggrieved by the operation of the program". U.S. Code Cong. & Ad. News 1971, pp. 2292-4.

**The fact that Congress removed from the circuit courts the jurisdiction they previously had under the ESA stands in stark contrast to BP's assertion (S. Br. 7-8) that the ESA does not "specifically take away from a party the right it otherwise has to appeal to a circuit court under [28 U.S.C.] §1292(a). "

that such review would "pose a serious threat to the program". 516 F.2d at 1401-1402.* The fact that Congress has recently reincorporated the ESA's review provisions into the EPAA, after the TECA's decisions analyzing the scope of its jurisdiction, indicates Congressional approval of the review system and decisions thereunder.

In Exxon, 516 F.2d at 1402-1404, the TECA noted the sound policy reasons that had prompted Congress so to circumscribe the jurisdiction of the TECA. These reasons included the possibility of delay of the progress of final judgment in the district court through the time consuming process of hearing unmeritorious interlocutory appeals -- "irrespective of the trial court's conviction that appeal would be frivolous or would not advance the final determination of the cause". BP insists (S. Br. 7) that merely "if it desires to appeal to one of the circuit courts rather than to TECA" it may circumvent and frustrate the Congressional purpose of having one court hear appeals under that Act. This it does in the face of the plain language and legislative history of the statutes involved and clear-cut decisions by the court with exclusive jurisdiction

* As BP points out (A. Br. 6-7), the TECA has held that appeal as a right of interlocutory injunctions issued under the EPAA is unavailable in both government and private actions. Spinetti v. Atlantic Richfield Company, 522 F.2d 1401 (Em. App. 1975); Gulf Oil Corp. v. FEA, 521 F.2d 810 (Em. App. 1975); Condor Operating Co. v. Sawhill, 514 F.2d 351 (Em. App, 1975).

of, and most familiar with, judicial review under the EPAA. BP (S. Br. 4, 10) also attempts to create the impression that, unless appeal as of right of interlocutory injunctions is permitted to the circuit courts, no review of such orders would be available. But Congress has provided that in cases warranting such interlocutory review, review may be had through the discretionary appeal procedures of 28 U.S.C. §1292(b). BP, which did not even attempt to obtain certification, is now simply attempting to cover its own failure by trying to obtain review in a court which has no jurisdiction.* This appeal should therefore be dismissed.

*BP (S. Br. 10) in effect argues that this Court should exercise jurisdiction expressly removed from it by Congress because it must in any event hear the issues regarding transfer and stay. But, as BP in its own reply brief (pp. 5-13) acknowledges, it is far from clear that the denial of the stay or the refusal to transfer are appealable. Despite BP's distended argument (Reply Brief 5-8), it is apparent that the refusal to stay an action for an injunction, pending resolution of an action already effectively terminated, simply does not constitute the denial of an injunction. And as BP concedes, the denial of transfer is not reviewable on appeal. The remote possibility that this Court may grant the extraordinary writ of mandamus to correct what certainly was a reasonable exercise of discretion by Judge Judd in refusing to transfer or stay this case is no reason for it to exercise jurisdiction it does not have over issues arising under the EPAA.

THE CONTRACTUAL RIGHTS BETWEEN THE PARTIES MUST BE CONSTRUED AS IF THE EPAA HAD ALWAYS BEEN IN EFFECT

BP (A. Br. 11-15) continues to urge this Court to read the 1973 letter agreement in a vacuum, and argues that, since the EPAA does not affect "normal contract rights", the statute has no effect on its attempt to accelerate payment on the marketing loans. Such an interpretation would permit BP to force Spiegel out of business, thus accomplishing indirectly what BP cannot do directly by refusing to sell gasoline to Spiegel. This result would effectively emasculate the EPAA, which has as one of its objectives, "to preserve the competitive viability of ... nonbranded independent marketers, and branded independent marketers". EPAA Section 4(b)(1)(D).

Under the original terms of the mortgage marketing loan agreements, payments could be accelerated only if the business relationship between the parties was terminated by either Spiegel or BP. BP's unilateral decision to terminate the sale of gasoline to Spiegel was the condition precedent to the acceleration of the payments to June 1973. This, in turn, required Spiegel to sign the 1973 agreement calling for payment in full by June 1974.

The EPAA, passed after the 1973 agreement was signed, is retroactive in nature, and it made BP's attempt to terminate its relationship with Spiegel illegal. By operation

of the EPAA, the respective rights of the parties must be measured as if the Act were in effect at all relevant times. Accordingly, not only was BP's attempt to stop selling gasoline to Spiegel invalid, but so was the results of that action: the original acceleration and the 1973 agreement. Simply put, in 1973 BP was not free to terminate the sale of gasoline to Spiegel and therefore was not entitled to accelerate the mortgage indebtedness. While BP recognizes that it is required under the EPAA to continue selling gasoline to Spiegel, it nevertheless continues its attempts to reap the fruits of its illegal attempt to terminate those sales. Such a result should not be permitted.

All the cases that BP cites (A. Br. 11-14) in support of its argument that the EPAA does not effect ordinary contract rights, involved the legitimate exercise of those rights by a party to a contract. In none of those cases was exercise of those contract rights prohibited, as in the instant case, by the EPAA. Had the original contract between Spiegel and BP provided for acceleration at the instance of BP, then the situation might be different. But the acceleration was conditioned on the termination of the business relationship between the parties -- a relationship expressly preserved by the EPAA.

Among the cases cited by BP are several holding that the EPAA does not prohibit refiners from exercising contract rights to terminate franchises. These cases, however, reflect the Congressional desire not to prevent legitimate termination of these relationships, so long as the independent marketers retain their rights to purchase gasoline. See, e.g., Guyer v. Cities Service Company, 381 F. Supp. 7, 10-11 (E.D. Wisc. 1974) and EPAA legislative history cited therein. On the other hand, to permit BP, through illegal acts, to force Spiegel out of business would be contrary to the purposes of the statute as expressed in its plain language. EPAA §4(b)(1)(C) and (F)

OTHER RECENT DEVELOPMENTS

By opinions dated October 25, 1974 and January 30, 1975, Chief Judge Whipple of the District of New Jersey, to whom the New Jersey action between Spiegel and BP had been assigned, denied requests by BP "to obtain virtually the same relief it had sought before the New York Court and is now seeking before the Second Circuit". (January 30 opinion at p. 4. A copy of that opinion is attached as Exhibit "B"). Judge Whipple held (Id. pp.7-8) that the validity of the 1973 letter agreement "is properly before the federal courts in New York" and that any action on his part "would be unnecessary and would promote unnecessary and duplicate litigation".

In a parting comment (S. Br. 15-16), BP resurrects the argument that Spiegel will not suffer irreparable harm if it is compelled to pay the present mortgage indebtedness in full. This argument has not improved with age, and continues to evidence BP's callous indifference to Spiegel's plight. Although it may be true, as BP contends, that interest rates are now declining, it is equally true (and a matter of wide public knowledge) that real estate loans are the single largest problem affecting virtually every bank in the country, so much so that the stability of some of them is question. BP's suggestion that Spiegel's widely scattered gas station properties would be favorably accepted as collateral for a mortgage loan simply ignores current, and pervasive economic conditions.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Spiegel's answering brief and its memorandum in support of its motion to dismiss, this appeal should be dismissed for lack of jurisdiction. Alternatively, the district court's order granting a preliminary injunction should be affirmed.

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EXHIBIT A

THE ENERGY POLICY AND CONSERVATION ACT OF 1975
PUBLIC LAW NO: 94-163

SEC. 452. Section 5 of the Emergency Petroleum Allocatio.. Act of 1973 is amended:

(1) by striking out "sections 205 through 211" in subsection (a)(1) of such section and inserting in lieu thereof "sections 205 through 207 and sections 209 through 211"; and

(2) by adding at the end of subsection (a) of such section the following:

"(3)(A) Whoever violates any provision of the regulation under section 4(a) of this Act, or any order under this Act shall be subject to a civil penalty—

"(i) with respect to activities relating to the production, distribution, or refining of crude oil, of not more than $20,000 for each violation;

"(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than $10,000 for each violation; and

"(iii) with respect to activities—

"(I) entirely relating to the distribution of residual fuel oil or any refined petroleum product at the retail level, or (II) activities not referred to in clause (i) or (ii) or subclause (I) of this clause,

of not more than $2,500 for each violation.

"(B) Whoever willfully violates any provision of such regulation, or any such order shall be imprisoned not more than 1 year, or—

"(i) with respect to activities relating to the production or refining of crude oil, shall be fined not more than $40,000 for each violation;

"(ii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than at the retail level), shall be fined not more than $20,000 for each violation;

"(iii) with respect to activities relating to the distribution of residual fuel oil or any refined petroleum product at the retail level or any other person shall be fined not more than $10,000 for each violation;

or both.

"(4) Any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of paragraph (3), shall be subject to penalties under this subsection without regard to any penalties to which that corporation may be subject under paragraph (3) except that no such individual director, officer, or agent shall be subject to imprisonment under paragraph (3), unless he also has knowledge, or reasonably should have known, of notice of noncompliance received by the corporation from the President.".

SEC. 454. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"REEVALUATION OF SECTION 4(a) REGULATION

"SEC. 11. (a) Not later than 60 days after the date of enactment of this section, the President shall give appropriate notice and afford interested persons an opportunity to present written and oral data, views, and arguments, respecting the appropriateness and the continuing need for, the application of any provision of the regulation promulgated under section 4(a) as such provision relates to the attainment of the objectives specified in section 4(b)(1) of section 4. A transcript shall be kept of any such oral presentation of data, views, and argument.

"(b) The President shall, after consideration of such written and oral presentations and such other information as may be available to him—

"(1) analyze such presentations and report thereon to the Congress within 120 days after the date of enactment of this section; and

"(2) shall promulgate, pursuant to the limitations and authority under section 12, such amendment, or amendments, to the regulation promulgated under section 4(a) as he determines are necessary or appropriate—

"(A) to modify any provisions of such regulation in a manner which is consistent with the attainment, to the maximum extent practicable, of objectives specified in section 4 (b)(1); or

"(B) to eliminate any provisions of such regulation no longer necessary to provide for the attainment of such objectives.".

SEC. 455. The Emergency Petroleum Allocation Act of 1973, as amended by this Act, is further amended by adding at the end thereof the following new section:

"CONVERSION MECHANISM TO STANDBY AUTHORITIES

"SEC. 12. (a) The President may not amend the regulation under section 4(a) in any manner which—

"(1) exempts crude oil produced in the United States from any provision of such regulation required to be made a part of such regulation by section 8; or

"(2) results in making such regulation, as so amended, inconsistent with any limitation or other requirement specified in section 8.

"(b) Except as provided in subsection (a), the President may amend the regulation under section 4(a) if he determines that such amendment is consistent with the attainment, to the maximum extent practicable, of the objectives specified in section 4(b)(1) and that the regulation, as amended, provides for the attainment, to the maximum extent practicable, of such objectives.

"(c)(1) Any such amendment which, with respect to a class of persons or class of transactions (including transactions with respect to

any market level), exempts crude oil, residual fuel oil, or any refined petroleum product or refined product category from the provisions of the regulation under section 4(a) as such provisions pertain to either (A) the allocation of amounts of any such oil or product, or (B) the specification of price or the manner for determining the price of any such oil or product, or both of the matters described in subparagraphs (A) and (B), may take effect only pursuant to the provisions of this subsection.

"(2) The President shall submit any amendment referred to in paragraph (1) to the Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act. Any such amendment shall be accompanied by a [illegible]e statement of the President's rationale for such amendment [illegible]e matter described in subsection (d) of this section. Such an amendment—

"(A) may apply only to one oil or one refined product category;

"(B) may apply to the matters specified in either subparagraph (A) or (B) of paragraph (1) of this subsection, or both; and

"(C) may provide for scheduled or phased implementation.

"(3) As used in this section the term 'refined product category' means—

"(A) motor gasoline;

"(B) Number 2 oils (Number 2 heating oil and Number 2-D diesel fuel);

"(C) propane; or

"(D) all or any portion of other refined petroleum products as a class (including natural gas liquids and natural gas liquid products, other than propane).

"(4) Such an amendment shall not take effect if either House of Congress disapproves such amendment in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act.

"(d)(1) The President shall support any amendment described in subsection (b) which is transmitted to the Congress under subsection (c) of this section with a finding that such amendment is consistent with the attainment of the objectives specified in subsection 4(b)(1) and in the case of—

"(A) any exemption described in subsection (c)(1)(A), with a finding that such oil or refined product category is no longer in short supply and that exempting such oil or refined product category will not have an adverse impact on the supply of any other oil or refined petroleum product subject to this Act; and

"(B) any exemption described in subsection (c)(1)(B), with a finding that competition and market forces are adequate to protect consumers and that exempting such oil or refined product category will not result in inequitable prices for any class of users of such oil or product.

"(2) Any amendment which the President submits to the Congress under subsection (c) of this section shall be accompanied—

"(A) by a statement of the President's views as to the potential economic impacts (if any) of such amendment which, where practicable, shall include his views as to—

"(i) the State and regional impacts of such amendment (including effects on governmental units);

"(ii) the effects of such amendment on the availability of consumer goods and services; the gross national product; competition; small business; and the supply and availability of energy resources for use as fuel or as feedstock for industry; and

"(iii) the effects on employment and consumer prices; and

"(B) in the case of an exemption described in subsection (c)(1)(B) of this section, by an analysis of the effects of such amendment on the rate of unemployment for the United States, the Consumer Price Index for the United States, and the implicit price deflator for the gross national product.

"(e) In any judicial review of an amendment required by this section to be submitted to Congress in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, the reviewing court may not hold unlawful or set aside any such amendment on the ground that any findings made by the President were not adequate to meet the requirements of subsection (c), (d), or (g) of this section or subparagraph (A), (E), or (F), of section 706(2) of title 5, United States Code.

"(f) With respect to any oil or refined product category which is exempted pursuant to the provisions of this section, the President shall have authority at any time thereafter to prescribe a regulation or issue an order respecting either the allocation of amounts, or the specification of price or the manner for determining the price, for any such oil or refined product category upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in section 4(b)(1). Any such oil or refined product category for which allocation or price requirements are reimposed under authority of this subsection may subsequently be exempted without regard to the provisions of subsection (c) of this section.

"(g) Notwithstanding the provisions of subsection (e) of section 4, the President may, if he determines that the exemption from payments for certain small refiners required by such subsection—

"(1) results in unfair economic or competitive advantage with respect to other small refiners; or

"(2) otherwise has the effect of seriously impairing the President's ability to provide in the regulation under section 4(a) for the attainment of the objective specified in section 4(b)(1)(D) and for the attainment of those other objectives specified in section 4(b)(1);

submit, in accordance with the procedures specified in section 551 of the Energy Policy and Conservation Act, an amendment to modify the regulation under section 4(a) with respect to the provisions of such regulation as they relate to such exemption. Such amendment shall not take effect if disapproved by either House of Congress under the procedures specified in such sections 551.".

SEC. 461. The Emergency Petroleum Allocation Act of 1973 is amended by adding to the end of such Act, as amended by this Act, the following new section:

"EXPIRATION OF AUTHORITIES

"SEC. 18. Notwithstanding any other provision of this Act, at midnight on the conclusion of the 40th month in which the amendment under section 8(a) is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 4(a) of this Act shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 4(b)(2), 8, and 9 of this Act shall terminate. The authority to promulgate and amend any regulation or to issue any order under this Act shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.".

SEC. 551. (a) *For purposes of this section, the term "energy action" means any matter required to be transmitted or submitted to the Congress in accordance with the procedures of this section.*

(b) *The President shall transmit any energy action (bearing an identification number) to both Houses of Congress on the same day. If both Houses are not in session on the day any energy action is received by the appropriate officers of each House, for purposes of this section such energy action shall be deemed to have been transmitted on the first succeeding day on which both Houses are in session.*

(c)(1) *Except as provided in paragraph (2) of this subsection, if energy action is transmitted to the Houses of Congress, such action shall take effect at the end of the first period of 15 calendar days of continuous session of Congress after the date on which such action is transmitted to such Houses, unless between the date of transmittal and the end of such 15-day period, either House passes a resolution stating in substance that such House does not favor such action.*

(2) *An energy action described in paragraph (1) may take effect prior to the expiration of the 15-calendar-day period after the date on which such action is transmitted, if each House of Congress approves a resolution affirmatively stating in substance that such House does not object to such action.*

(d) *For the purpose of subsection (c) of this section—*

(1) *continuity of session is broken only by an adjournment of Congress sine die; and*

(2) *the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 15-calendar-day period.*

(e) *Under provisions contained in an energy action, a provision of such an action may take effect on a date later than the date on which such action otherwise takes effect pursuant to the provisions of this section.*

(f)(1) *This subsection is enacted by Congress—*

(A) *as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in the House in the case of resolutions described by paragraph (2) of this subsection; and it supersedes other rules only to the extent that it is inconsistent therewith; and*

(B) *with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.*

(2) *For purposes of this subsection, the term "resolution" means only a resolution of either House of Congress described in subparagraph (A) or (B) of this paragraph.*

(A) *A resolution the matter after the resolving clause of which is as follows: "That the _____ does not object to the energy action numbered _____ submitted to the Congress on _____, 19 .", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one energy action.*

(B) *A resolution the matter after the resolving clause of which is as follows: "That the _____ does not favor the energy action numbered _____ transmitted to Congress on _____, 19 .", the first blank space therein being filled with the name of the resolving House and the other blank spaces therein being appropriately filled; but does not include a resolution which specifies more than one energy action.*

(3) A resolution once introduced with respect to an energy action shall immediately be referred to a committee (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(4)(A) If the committee to which a resolution with respect to an energy action has been referred has not reported it at the end of 5 calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration of any other resolution with respect to such energy action which has been referred to the committee.

(B) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same energy action), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(C) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same energy action.

(5)(A) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(B) Debate on the resolution referred to in subparagraph (A) of this paragraph shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to; except that it shall be in order—

(i) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2)(A) of this subsection with respect to an energy action, for a resolution described in paragraph (2)(B) of this subsection with respect to the same such action, or

(ii) to offer an amendment in the nature of a substitute, consisting of the text of a resolution described in paragraph (2)(B) of this subsection with respect to an energy action, for a resolution described in paragraph (2)(A) of this subsection with respect to the same such action.

The amendments described in clauses (i) and (ii) of this subparagraph shall not be amendable.

(6)(A) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution and motions to proceed to the consideration of other business, shall be decided without debate.

(B) Appeals from the decision of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution shall be decided without debate.

(7) Notwithstanding any of the provisions of this subsection, if a House has approved a resolution with respect to an energy action, then it shall not be in order to consider in that House any other resolution with respect to the same such action.

Exhibit B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 554-73

M.S.S. ECONOMY OIL CORPORATION, a New York corporation authorized to do business in New Jersey; SPIEGEL OIL CORPORATION NEW JERSEY, a New York corporation authorized to do business inthe State of New Jersey; M. SPIEGEL & SONS OIL CORPORATION, a New York corporation, and SPIEGEL OIL CORPORATION STATEN ISLAND, a New York corporation

Plaintiffs

v.

BP OIL CORPORATION, a corporation of the State of Delaware

Defendant.

O P I N I O N
A N D
O R D E R

Appearances:

Nolan, Lynes, Bell & Moore
Attention: Joseph M. Nolan, Esq.
Attorneys for the Plaintiffs
60 Park Place
Newark, New Jersey 07102

McCarter & English
Attention: Eugene M. Haring, Esq.
Attorneys for the Defendant
550 Broad Street
Newark, New Jersey 07102

W H I P P L E, Chief Judge

This matter is before the Court on defendant's motion for oral re-argument. Defendant asks this Court to reconsider its dismissal of certain requests for relief previously sought by defendan

Before considering the merits of this motion, it is necessary to review the procedural history which led to the filing of this motion.

Plaintiffs instituted suit against the defendant on April 23, 1973 seeking to enjoin it from terminating the sale of gasoline, from accelerating certain mortgage notes, and from foreclosing on certain mortgages held by defendant. The claim for relief was based upon the antitrust laws and charged defendants with a monopolistic refusal to deal.

On June 30, 1973, BP announced it would discontinue its sale of branded gasoline to M. Spiegel & Sons Oil Corporation. BP had previously terminated the sale of unbranded gasoline to the other plaintiffs.

Plaintiffs' filed a motion for a preliminary injunction and hearings were held between May 1, 1973 and mid-June. On June 30, 1973, BP had in fact cut off all gasoline deliveries to the plaintiffs.

On July 3, 1973, this Court denied plaintiffs' application for a temporary restraining order pending decision on the application for a preliminary injunction.

On July 11, 1973, Spiegel entered into an agreement with BP, whereby it agreed to drop its claims against the defendant and to immediately pay $400,000 of the mortgage indebtedness, in return for BP's promise to sell gasoline to Spiegel until June 30, 1974 and to refrain from accelerating the balance of the mortgage indebtedness until that time. The settlement agreement required that plaintiffs execute a stipulation of discontinuance which was in fact drawn,

signed and forwarded to counsel for defendant. The stipulation of discontinuance, however, has never been filed with this Court.

In December of 1973, in an effort to alleviate the serious disruptions occasioned by the gasoline shortage, Congress enacted the Emergency Petroleum Allocation Act, Pub. L. No. 93-159 §4(c)(1) (November 27, 1973). This act was designed to assure each independent distributor of a continuing supply of gasoline equal to the amounts purchased by it during the calendar year 1972.

Threatened by the pending cut-off of deliveries of gasoline on June 30, 1974 (as per the settlement agreement) if it did not pay the balance of its mortgage indebtedness, Spiegel instituted an action against BP in the United States District Court for the Eastern District of New York, based on its contention that the pending cut-off and mortgage demand were violative of the EPAA. The plaintiffs sought an injunction restraining BP from terminating the sale of gasoline to Spiegel, from accelerating its mortgage indebtedness, and from commencing any foreclosure actions against it. Plaintiffs further asked the New York Court to set aside the July 11, 1973 agreement on the basis of duress.

On June 25, 1974 the New York Court denied the defendant's motion to transfer the action to New Jersey and issued a preliminary injunction sought by plaintiffs. On July 12, 1974 another hearing was held and the New York Court rendered its opinion on July 26, 1974. In addition to continuing the preliminary injunction, the Court restrained BP from cutting off Spiegel's gasoline supplies and enjoined an attempt to either accelerate or enforce the mortgage

indebtedness. A motion by defendant to transfer the action to New Jersey was again denied.

On July 30, 1974 BP filed a notice of appeal to the Second Circuit Court of Appeals.

Prior to the decision of the New York District Court, defendant moved on an order to show cause to obtain virtually the same relief it had sought before the New York Court and is now seeking before the Second Circuit. BP asked this Court to direct Spiegel to challenge the settlement agreement only in New Jersey. In addition, it sought an order from this Court specifically enforcing the July 11, 1973 settlement agreement and entering judgment in the amount of the mortgage indebtedness, despite the fact that the New York Court restrained such action.

In a letter opinion filed October 25, 1974, this Court dismissed without prejudice defendant's motion pending the disposition of the action currently before the Second Circuit. It was the Court's feeling at that time that it would be inappropriate to intercede in the New York litigation since the relief sought was substantially the same in both actions.

On November 8, 1974, BP filed a motion for oral re-argument of points A and B of the requests for relief contained in its petition and this Court granted such motion. The re-argument was heard on January 27, 1975.

The requests which BP Oil Corporation wishes this Court to reconsider are as follows:

A. That the stipulation of settlement and dismissal

entered into by the two parties in 1973 be approved and filed; and

B. That judgment be entered on the stipulation, which itself refers to the settlement agreement of July 11, 1973.

BP Oil contends that the rationale upon which the Court denied requests A and B of its petition, i.e., that the same issues are squarely presented in an action pending in the Eastern District of New York and in the appeal to the Second Circuit, is incorrect. It maintains that neither New York Court has before it a consideration of the validity of the July 11, 1973 settlement agreement and only this Court can approve, file, and enter judgment thereon.

The issues presented to the Second Circuit on appeal are as follows:

1. Did the District Court abuse its discretion by refusing to transfer this action to New Jersey for consolidation with the prior New Jersey action or, in the alternative, to stay this action pending final determination of the New Jersey action?

2. Did the District Court abuse its discretion by enjoining BP from terminating the sale of gasoline, when there was no showing that BP threatened such termination as long as the new Emergency Petroleum Allocation Act ("EPAA") remained in effect?

3. Did the District Court abuse its discretion by enjoining BP from "accelerating the payment schedule and/or the maturity dates of mortgage indebtedness" and from foreclosing on the mortgages when:

   (a) Spiegel's obligation to BP fell due on June 30, 1974, and there was no question of "acceleration";

(b) Spiegel did not adequately demonstrate a threat of irreparable or even substantial injury from collection of the debt or even foreclosure on the particular properties; and

(c) the EPAA and Federal Energy Administration Regulations do not interfere with BP's collection of such overdue mortgage indebtedness.

BP further contends that it is not requesting this Court to take any action which in any way conflicts with the pending injunction issued in the Eastern District of New York. Such injunction, now on appeal, requires BP to continue gasoline supplies to Spiegel and restrains BP from foreclosing on Spiegel's mortgage indebtedness. The injunction is based on the proposition that even though gasoline supply and mortgage repayment provisions of the July 11, 1973 agreement were executed, the 1974 termination date must be extended because of the subsequent intervention of the EPAA.

BP also asserts that this request has been made because the July 11, 1973 settlement agreement constitutes a release by plaintiffs of antitrust and other claims against the defendant. If this Court enters judgment on the agreement over plaintiffs' claims of "coercion", BP maintains that the judgment will be res judicata of many of plaintiffs' New York claims. In essence, the only relief requested by BP is that this Court decide that the settlement agreement was validly made, and that the release provisions in the agreement are effective.

Plaintiffs, on the other hand, contend that the validity of the July 11, 1973 agreement is directly in issue in the New York action. This Court, in its letter opinion of October 25, 1974, agreed with the plaintiffs' position when it held that the defendant's motion be dismissed without prejudice pending the action of the New

York Courts.

This Court once again finds the defendant's arguments unpersuasive and is of the opinion that the validity of the questioned settlement agreement is properly before the federal courts in New York. It is unnecessary for this Court to take any action whatsoever with respect to the agreement at this time.

In its answer to the complaint in the New York action, BP asserted the agreement as a defense and by counterclaim sought judgment enforcing it. Thus, it is clear to the Court that the validity of the agreement was put directly in issue by the pleadings.

BP's contention that the original trial court has the power to determine the validity of a settlement agreement is quite correct. See Autera v. Robinson, 419 F.2d (D.C. Cir. 1969); Kelly v. Greer, 365 F.2d 669 (3rd Cir. 1966), cert. denied, 385 U.S. 1035 (1967); Berger v. Grace Line, Inc., 343 F. Supp. 755 (E.D. Pa. 1972). However, in the present case, such exercise of authority would result in a duplication of litigation and sound policy considerations dictate that such unnecessary litigation should be eliminated. See Ingalls Iron Works Co. v. Ingalls, 177 F. Supp. 151 (N.D. Ala. 1959), aff'd, 280 F.2d 423 (5th Cir. 1960).

If this Court were to approve and enter a judgment on the settlement agreement (thus creating an appealable final order) while the action is pending before the New York Courts, it could lead to appeals in two circuits based on substantially the same facts.

The defendant is in no way unfairly prejudiced by this Court's inaction at the present time. Although not specifically se

forth in the issues presented to the Second Circuit, it is clear that the validity of this settlement agreement was before the New York District Court and will in the near future necessarily be determined. Indeed, the defendants' answer and counter-claim placed the agreement in issue and therefore a resolution will eventually be essential. This court feels that any action on its part at the present time would be unnecessary and would promote unnecessary and duplicate litigation.

After a thorough reconsideration of the above matter, it is this court's opinion that the decision previously rendered by this court is correct and it will therefore stand.

SO ORDERED

LAWRENCE A. WHIPPLE
Chief Judge, U.S.D.C.

January 30, 1975